UNITED STATES COPYRIGHT OFFICE

Long Comment Regarding a Proposed Exemption Under 17 U.S.C. § 1201

[ ] Check here if multimedia evidence is being provided in connection with this comment

ITEM A. COMMENTER INFORMATION

Christian Troncoso (christiant@bsa.org) on behalf of BSA | The Software Alliance ("BSA") (www.bsa.org).

BSA is the leading advocate for the global software industry before governments and in the international marketplace. It is an association of world-class companies that invest billions of dollars annually to create software solutions that spark the economy and improve modern life. BSA's members include: Adobe, ANSYS, Apple, Autodesk, Bentley Systems, Box, CA Technologies, CNC/Mastercam, DataStax, DocuSign, IBM, Informatica, Microsoft, Okta, Oracle, salesforce.com, SAS Institute, Siemens PLM Software, Splunk, Symantec, Trimble Solutions Corporation, The MathWorks, Trend Micro and Workday.

ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 9: Computer Programs—Software Preservation.

ITEM C. OVERVIEW

The proposed exemption would allow circumvention of technological protection measures ("TPMs") on "lawfully acquired software" by "libraries, archives, museums, and other cultural heritage institutions" for "the purposes of preserving software and software-dependent materials." BSA supports a proposed exemption to enable preservation of software and software-dependent materials by libraries, archives, museums, and other cultural heritage institutions with public service missions, provided the class of works to which the exemption applies is limited to works stored on "obsolete" formats, including computer programs no longer reasonably available in the commercial marketplace. This qualification is necessary to ensure that the exemption is limited to non-infringing uses of works and to those uses with regard to which "the statutory prohibition on circumventing access controls is the cause of the adverse effects" on such non-infringing uses, Copyright Office, *Notice of Proposed Rulemaking*, 82 Fed. Reg. 49550, 49551 (Oct. 26, 2017) [hereinafter, "Notice of Proposed Rulemaking"].

ITEM D. TECHNOLOGICAL PROTECTION MEASURE(S) AND METHOD(S) OF CIRCUMVENTION

[Intentionally left blank]

ITEM E. ASSERTED ADVERSE EFFECTS ON NONINFRINGING USES

1. Overview

The Petition submitted by the Cyberlaw Clinic at the Berkman Klein Center for Internet and Society, The Software Preservation Network, and Library Copyright Alliance ("Petitioners") proposes an exemption "for libraries, archives, museums, and other cultural heritage institutions to circumvent technological protection measures on lawfully acquired computer programs for the purposes of preserving computer programs and computer program-dependent materials."[1] Although BSA supports the proposed exemption in principle, we urge the Register to carefully tailor the class of works to which the exemption applies in line with preservation exemptions approved in prior rulemakings. Absent this limitation, Petitioners cannot meet their burden of proving that the proposed exemption satisfies the requirements of Section 1201.[2]

Petitioners characterize the proposed exemption as "a continuation of the digital preservation effort that the Copyright Office and the Librarian had recognized in 2003 and 2006, and the Library of Congress has continued to promote."[3] The 2003 and 2006 preservation exemptions on which Petitioners rely, however, contained important limitations on the class of works to which the exemptions applied—limitations that are not explicitly included in Petitioners' description of the class for which they are now seeking an exemption. Specifically, the 2003 and 2006 preservation exemptions were limited to circumvention performed on "obsolete" works—namely, works that are "distributed in formats that have become obsolete" and that "require the original media or hardware as a condition of access."[4]

The Register's reasons for limiting the 2003 and 2006 preservation exemptions to such obsolete works apply with equal force to Petitioners' proposed exemption for computer programs and "computer program-dependent materials." First, most of the examples provided in the Petition in explaining the need for the exemption involve works stored in formats that are obsolete or otherwise no longer commercially available. For instance, Petitioners describe the adverse impacts as follows:

- "[O]ne of the biggest problems with digital collections is the incredible speed at which software . . . becomes obsolete."[5]

---

[1] *Petition in Support of Class 9 — Computer Programs — Software Preservation*, at 2 (hereinafter "Petition").

[2] *See* Register of Copyrights, *Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights* 343 (2015) (noting that "the party seeking the exemption has the burden of supporting its request with evidence and legal argument") [hereinafter "2015 Recommendation"].

[3] *Petition*, at 3.

[4] *See* Register of Copyrights, *Section 1201 Rulemaking: Second Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights* 59 (2003) [hereinafter "2003 Recommendation"]; Register of Copyrights, *Section 1201 Rulemaking: Third Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights* 24 (2006) (limiting class to computer programs and video games "distributed in formats that have become obsolete and that require the original media or hardware as a condition of access") [hereinafter "2006 Recommendation"].

[5] *Petition*, at 4.

- "[W]hen the original software program is no longer available, many dependent data files are also no longer accessible."[6]
- "Obsolescence is common in physical storage media in as few as five years."[7]
- "The Electronic Literature Organization . . . cannot save significant portions of its collection due to proprietary but obsolete software."[8]

Second, limiting the proposed exemption to obsolete works is necessary to enable Petitioners to satisfy their burden of establishing that the proposed exemption (i) is necessary to enable non-infringing uses of works[9] and (ii) covers only those uses with regard to which "the statutory prohibition on circumventing access controls is the cause of the adverse effects."[10] We address each of these points further below.

2. Non-infringing uses

In seeking to identify the non-infringing uses for which the proposed exemption is needed, Petitioners point to Sections 108, 107, and 117 of the Copyright Act.[11] In fact, only Section 108 provides a solid basis for such non-infringing uses, and it provides such a basis only with respect to works distributed in obsolete formats, including computer programs not reasonably available in the commercial marketplace.

a. Section 108

In prior Section 1201 rulemaking proceedings involving preservation exemptions, the Register has been clear that Section 108 provides the primary basis for identifying non-infringing uses. As the Register noted in the 2003 Recommendation:

> Because §108 was enacted specifically to address reproduction by libraries and archives, and was amended by the Digital Millennium Copyright Act to address certain digital issues, analysis of noninfringing archival and preservation activities logically begins with that section.[12]

The Register reaffirmed the primacy of Section 108 in evaluating the 2006 proposed preservation exemption for computer programs and video games.[13]

For purposes of the preservation activities covered by Petitioners' proposed exemption, the relevant provision of Section 108 is subsection (c), which permits reproduction of a work "solely for the purpose of replacement of a copy . . . that is damaged, deteriorating, lost, or stolen, *or if the existing format in which the work is stored has become obsolete*."[14] Section 108(c) further

[6] *Petition*, at 5.
[7] *Petition*, at 6.
[8] *Petition*, at 8.
[9] *See* 17 U.S.C. 1201(a)(1)(C)
[10] Copyright Office, *Notice of Proposed Rulemaking*, 82 Fed. Reg. 49550, 49551 (Oct. 26, 2017).
[11] *See Petition*, at 9-18.
[12] *2003 Recommendation*, at 51.
[13] *See 2006 Recommendation*, at 29 ("The primary basis for [petitioner's] claim that such archival activity is, in general, non-infringing, and the basis that is most clearly applicable, is the extent to which its activity falls within the scope of §108.").
[14] 17 U.S.C. 108(c) (emphasis added).

provides that "a format shall be considered obsolete if the machine or device necessary to render perceptible a worked stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace."[15]

Drawing on this statutory language, the Register limited the 2003 preservation exemption to computer programs and video games "distributed on formats that have become obsolete" and clarified that limitation as follows:

> [A] format shall be considered obsolete if the machine or system necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace. A work is not considered 'reasonably available' if it can only be purchased in second-hand stores.[16]

In explaining its rationale for limiting the preservation exemption to such obsolete works, the 2003 Recommendation cited the Senate Judiciary Committee's report on the DMCA, which states:

> The amendment to subsection (c) [of Section 108] also broadens its coverage to allow the updating of obsolete formats. . . . This provision is intended to permit libraries and archives to ensure that copies of works in their collections continue to be accessible and useful to their patrons. *In order to ensure that the provision does not inadvertently result in the suppression of ongoing commercial offerings of works in still-usable formats, the amendment explicitly provides that, for purposes of this subsection, a format will be considered obsolete only if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or reasonably available in a commercial marketplace*. Under this language, if the needed machine or device can only be purchased in second-hand stores, it should not be considered "reasonably available."[17]

The Register endorsed the same definition of "obsolete" in connection with the 2006 exemption for "computer programs and video games that have become obsolete."[18]

These past rulemakings confirm that, in order to limit the scope of a preservation exemption to non-infringing uses, the class of works to which the exemption applies must be limited to works "distributed on formats that have become obsolete," including computer programs not reasonably available in the commercial marketplace. Expanding the exemption to include non-obsolete works (*i.e.*, works available on non-obsolete formats) would open the exemption to many uses that are not excused as non-infringing under Section 1201—an outcome the Register has repeatedly cited as grounds for rejecting proposals to extend the class of works more broadly.[19] Moreover, to the extent that access to a digital file is inhibited merely by the fact that the computer program or hardware needed to view the file is obsolete—and not due to the use of a

---

[15] *Id.* In its recent Discussion Document on Section 108, the Copyright Office recommended no changes to Section 108's definition of "obsolete." *See* Copyright Office, *Section 108 of Title 17: A Discussion Document of the Register of Copyrights* 34 (Sept. 2017) ("In both the current section 108 and the Model Statutory Language, a format is considered obsolete if the device needed to perceive the work is either no longer manufactured or no longer reasonably available in the commercial marketplace.").

[16] *2003 Recommendation* at 50-51 (footnote omitted).

[17] *Id.* at 54 (quoting S. Rep. No. 105-190, at 62 (1998)) (emphasis added).

[18] *See 2006 Recommendation*, at 24-30.

[19] *See, e.g., 2006 Recommendation*, at 30-33.

technological protection measure—activity undertaken to access the file would not constitute a prohibited circumvention under Section 1201, and therefore would not require an exemption.[20]

b. Section 107

Petitioners also rely on Section 107 of the Copyright Act in seeking to identify non-infringing uses for which the proposed exemption is needed.[21] In prior rulemakings involving similar preservation exemptions, however, the Register has been clear that Section 107 does not provide a basis for extending the scope of such exemptions beyond the uses permitted under Section 108. As the Register explained in its 2003 Recommendation:

> The Register does not recommend broadening the exemption [for computer programs and video games distributed in formats that have become obsolete] based on fair use, which is codified in §107. In determining whether libraries and archives may circumvent access controls for the purpose of systematic preservation of digital works, the Register believes that reliance on §107 is inappropriate. While it is true that some preservation activity beyond the scope of §108 may well constitute a fair use, it is improper in this context to generalize about the parameters of §107. Fair use involves a case-by-case analysis that requires the application of the four mandatory factors to the particular facts of each particular use. Since disparate works may be involved in the preservation activity and the effect on the potential market for the work may vary, sweeping generalizations are unfounded.[22]

The Register reaffirmed this position in its 2006 Recommendation[23] and did so again in its 2015 Recommendation.[24]

Nothing in Petitioners' submission provides any basis for the Register to revisit its past determinations on this issue. Indeed, in seeking to shoehorn the proposed exemption into the statutory fair use factors, Petitioners repeatedly reference examples that merely underscore the extent to which the preservation activities targeted by the exemption involve works stored on obsolete or otherwise "vintage" formats.[25]

Accordingly, consistent with the Register's determinations in prior rulemakings, the Register should conclude once again that Section 107 provides no basis to extend the scope of works

---

[20] *See, e.g.*, *id.* at 30-31 ("there is no reason to conclude that obsolete operating systems or obsolete hardware are technological measures that control access to works").
[21] *See Petition*, at 9-13.
[22] *2003 Recommendation*, at 54-55 (footnotes omitted).
[23] *See 2006 Recommendation*, at 29 ("there is no legal basis to assert that systematic archival activity of libraries and archives that is outside the scope of §108 would necessarily be covered by the fair use doctrine in §107"),
[24] *See 2015 Recommendation*, at 342 ("The Register finds that Section 108 provides useful and important guidance as to Congress's intent regarding the nature and scope of legitimate preservation activities, and hence the types of uses that are most likely to qualify as fair in this area.").
[25] *See, e.g.*, *Petition*, at 11 (citing need to "mak[e] *vintage* software and software-dependent materials accessible for research" and that "observing the functionality of *older* software is necessary to preserve access to software dependent material *that would otherwise be unreadable*"); 12 (noting that "[t]he Senate Report on the Copyright Act of 1976 recognized that the use of copyrighted material that is "*out of print" or otherwise unavailable* is likely to fall under fair use," that "[p]roviding access to *vintage software* may, in some cases, be impossible without copying the whole work," and that "[s]cholars require access to *vintage word processing programs, design software, and the like* in order to study them") (emphases added).

covered by the exemption beyond works distributed on obsolete formats, including computer programs no longer reasonably available in the commercial marketplace.

c. Section 117

Petitioners also cite Section 117 of the Copyright Act in seeking to identify non-infringing uses for which the proposed exemption is needed. The relevant provision of that Section, however, is limited to permitting the owner of a copy of a computer program to make another copy "for archival purposes only" *and* provided "that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful."[26]

The Register has previously considered whether Section 117 provides a basis to expand the scope of proposed preservation exemptions beyond those uses permitted under Section 108, and has concluded that it does not. For instance, in its 2003 Recommendation, after an extensive analysis of whether Section 117(a)(2) justified extending a proposed preservation for computer software and video games beyond those distributed on obsolete formats, the Register concluded:

> Because it seems unlikely at best that the activities asserted by [petitioner] as a justification for exempting a class of works fall within the scope of §117(a)(2), the Register cannot conclude that that provision would justify exempting a class of works broader than that which is justified based on an application of §108(c). Moreover, the fact that the activity for which an exemption is sought fits far more comfortably within the scope of §108 than that of §117 persuades that Register that reliance on §117 to exempt a potentially broader class than could be supported under §108 would be unjustified. *The fact that §117 was not created to enable libraries and archives to perform their important public functions—that is the purpose of §108—leads to the conclusion that any exemption designed to address the concerns raised by [petitioner] should be limited to the congressionally-chosen parameters of section 108, especially when Congress redefined those parameters as part of the DMCA.*[27]

As in the case of the 2003 Recommendation, Petitioners here do not seek to make "back-up" copies of works that would fall within the scope of Section 117(a)(2). Instead, their proposed exemption would cover the creation of "use" copies of works—specifically, copies used for preservation and archival purposes. For these purposes, Section 117 is simply inapplicable. Accordingly, for the same reasons it rejected past petitioners' reliance on Section 117 to expand the scope of the preservation exemption in 2003, the Register should likewise reject Petitioners' attempts to do so in this proceeding.

3. Cause of the adverse effects

As noted in the Notice of Proposed Rulemaking, parties seeking an exemption have the burden of establishing both that users are adversely affected in their ability to make non-infringing uses of works, and that "[t]he statutory prohibition on circumventing access controls *is the cause* of the adverse effects."[28] Although the Petition appears to satisfy this burden with respect to works

[26] 17 U.S.C. 117(a)(2).

[27] *2003 Recommendation*, at 58-59; *accord 2006 Recommendation*, at 29 (noting that § 117(a)(2) "protect[s] against damage or the destruction of the original computer program that might be caused by mechanical or electrical failure" and therefore that it "does not serve to immunize systematic archival activities by libraries or archives of computer programs generally.").

[28] *Notice of Proposed Rulemaking*, at 49551 (emphasis added).

distributed on obsolete formats, including computer programs no longer reasonably available in the commercial marketplace, it fails to satisfy that burden with regard to works that are commercially available in non-obsolete formats.

For instance, the Petition suggests that the exemption should cover cases in which copyright holders in a computer program are known and willing to license, but negotiating with all of these copyright holders would be "difficult."[29] The Petition also suggests that the exemption should cover cases in which "the publisher for a work is clear and still in business, and even licensing their works," but "has not made software available for license in a particular use."[30]

The proposed exemption should not extend to any of these situations (or others) involving non-obsolete works, because in none of them is the TPM *the cause* of the adverse effects on preservation activities. Rather, the cause is Petitioners' unwillingness or inability to license the work on terms offered by the relevant copyright holder(s). Moreover, extending the exemption to cover instances where the work at issue is still available on the market—whether in the same format or in a different format—would adversely affect "the market for or value of [the] copyrighted works" at issue, and thus weigh against approving the exemption under the statutory criteria that the Register must consider.[31] As the Register explained in its 2003 Rulemaking in limiting the preservation exemption at issue there to works distributed on obsolete formats:

> Such a decision to tailor the class carefully is supported by clear evidence in the marketplace that computer programs and video games are a significant part of the works distributed unlawfully over the Internet and through the reproduction and distribution of unauthorized copies. Sensitivity to such widespread illegal trafficking is obviously critical to this rulemaking process, since these concerns formed the impetus for providing copyright owners with the protections afforded by the DMCA.[32]

These reasons apply with equal force to the proposed preservation exemption sought by Petitioners. Accordingly, the Register should reject Petitioners' efforts to extend the exemption to non-obsolete works in this case as well.

DOCUMENTARY EVIDENCE

[Intentionally left blank]

[29] *See Petition*, at 9, 13; *see also id.* at 19 ("When the holders of archived software copyrights are willing to license their software, the transaction costs of negotiating with hundreds of different publishers is beyond the already strained resources of preservation efforts.").
[30] *Id*. at 13.
[31] *See Notice of Proposed Rulemaking*, at 49551 (citing 17 U.S.C. 1201(a)(1)(C)).
[32] *2003 Recommendation*, at 62.